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No. 01-1325

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ET AL.,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*, CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS, SMALL PROPERTY OWNERS ASSOCIATION, SCOTT SHERMAN, DAVID PARKER, AND KAREN PARKER, REP. FRANCIS L. MARINI SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the *ad hoc* regulatory takings analysis is the appropriate test when government actually transfers ownership of private property rather than merely regulating the use of the property.

Where a state entity creates a mechanism for taking private property, which does not include any process for providing compensation, is injunctive relief an appropriate remedy.

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INTEREST OF THE *AMICI CURIAE*[*]

The *Amici Curiae* are the plaintiffs in the case of *Citizens for the Preservation of Constitutional Rights, et al. v. Chief Justice Marshall, et al.*, No. 02-cv-10125 MLW (D.Mass. filed Jan. 23, 2002), which challenges the constitutionality of the Massachusetts IOLTA program. They are joined by a Massachusetts elected official, who is participating in that case as an *amicus* at the district court. The Massachusetts plaintiffs are all victims of IOLTA's unconstitutional taking of

[*] This brief is filed with the written consent of all parties. Attorneys for the parties took no part in the authoring of this brief, in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

private property and the forced contribution to the political speech of groups with whom they do not agree. Much of the $10,000,000.00 in private money taken by the Massachusetts Supreme Judicial Court through IOLTA annually, goes to hiring lawyers to sue small property owners and to lobby against pro-property owner legislation. Because small property owners regularly utilize the services of attorneys, they are also one of the most frequent contributors (all be it against their will) to IOLTA. Grant recipients, such as Greater Boston Legal Services, which maintains a staff of 68 attorneys, are largely devoted to suing landlords on behalf of tenants. *See* www.gbls.org. ***Therefore, amici are forced to pay for the lawyers who sue them.***

Amicus Citizens for the Preservation of Constitutional Rights (CPCR) is a non-profit law firm located in Boston, Massachusetts.[1] CPCR represents clients who's equal protection, speech, religious or property rights have been violated by government actors. *See* www.JulyFourth.net. CPCR seeks compensatory damages for some of these clients. As a law firm practicing within the Commonwealth of Massachusetts, CPCR maintains an IOLTA account as required by Massachusetts Supreme Judicial Court Rule 3:07, Cannon 9, *Massachusetts Rules of Professional Conduct*, (Mass.R.Prof.C.) Rule 1.15. *See* 431 Mass. 1302 (2000) (publishing SJC Rule 3:07). CPCR's cases are regularly opposed by other non-profit firms, who have the advantage of receiving generous IOLTA grants.

Amicus Small Property Owners Association (SPOA) is an unincorporated association with over 3,000 members. SPOA is based in Cambridge, Massachusetts. The property owners who make up

[1] CPCR is a non-stock, non-profit corporation. It has no parent corporation and no publicly held company owns any of its stock.

this association regularly do business with attorneys in Massachusetts and their funds are regularly placed in IOLTA accounts. SPOA, itself, has engaged the services of attorneys within the Commonwealth and will do so again in the future.

Amicus Scott Sherman is a citizen of the Commonwealth of Massachusetts. In the course of his business dealings, he has in the past engaged the services of attorneys and expects to continue to do so. Currently Mr. Sherman has money held in an IOLTA account. Mr. Sherman has been sued by individuals represented by attorneys funded through IOLTA.

Amici David Parker and Karen Parker are citizens of the Commonwealth of Massachusetts. In the course of their business, they have engaged the services of attorneys and expects to continue to do so. The Parkers have previously had funds placed into IOLTA trust accounts.

These *amici* have all had their property taken by the Massachusetts Supreme Judicial Court without just compensation. They have all been forced to contribute their funds to support the expressive activities of others with whom they do not agree.

The plaintiffs in the Massachusetts IOLTA case are joined in this brief by *Amicus* State Representative Francis L. Marini. Rep. Marini was elected to the Massachusetts House of Representatives in 1994 and was elected Minority Leader on January 6, 1999, and again on January 3, 2001. Rep. Marini is an *amicus* in the Massachusetts IOLTA case. Rep. Marini believes that IOLTA is damaging to the structure of Massachusetts government and intrudes on the powers of the legislature. Rep. Marini is a personal witness to the lobby activity paid for by client funds taken through IOLTA.

SUMMARY OF THE ARGUMENT

The decision of the Fifth and Ninth Circuits need to be reconciled. With IOLTA programs in all 50 states, additional suits like the one brought by the *amici* in Massachusetts are inevitable.

Additionally, the decision of the *en banc* panel of the Ninth Circuit provides this Court with the opportunity to further clarify when the *ad hoc* and *per se* takings analyses are appropriate.

IOLTA is damaging to the fundamental principles that property belongs to the individual, not the state, as well as the principle that the state cannot force individuals to fund political speech or expression that is contrarily to their beliefs. As this Court has long noted, "in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

STATEMENT OF THE CASE

Massachusetts, like the other 49 states, has adopted an IOLTA program. The Massachusetts IOLTA program is mandated by the Justices of the Massachusetts Supreme Judicial Court for all attorneys practicing within the Commonwealth. Mass.R.Prof.C. 1.15. Similar to Washington State, the Massachusetts - IOLTA rules require attorneys to maintain a separate pooled account for certain client funds held by that attorney, *i.e.*, those which "are nominal in amount, or are to be held for a short period of time", must be placed in a "pooled account ('IOLTA account')." *Compare*, Washington Disciplinary Rule (Wash. DR) 9-102 and Mass.R.Prof.C. 1.15. The interest income generated by these client funds is turned over to the Court.

As in Washington, the Supreme Judicial Court mandates that, "[l]awyers shall certify their compliance with [the IOLTA] rule" as a prerequisite to practicing within the Commonwealth. Mass.R.Prof.C. 1.15(e)(3).

These funds are the property of the client and are held in trust by their attorney. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) ("the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal" – the client); *Kent v. Dunham*, 106 Mass. 586, 591 (1871) ("interest follows as an accretion to the principal legacy").

Despite the finding by this Court that the interest income generated by these accounts belongs to the individual clients, the Supreme Judicial Court of Massachusetts continues to take clients' interest income, for its own use, in the amount of over $10,000,000.00 a year.

The money taken in Massachusetts is distributed through a committee created by the Justices of the Supreme Judicial Court, the Massachusetts IOLTA Committee.[2] The funds are distributed to various Recipient Organizations. The Massachusetts IOLTA rules do not prevent these Recipient Organizations from using the funds for lobbying or for the drafting of legislation.

Recipient Organizations regularly utilize IOLTA grants to engage in litigation against the individuals whose funds generated the interest income in the IOLTA accounts. The result is that individuals, like

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[2] The Massachusetts IOLTA Committee utilizes three other organizations to review grant requests: the Massachusetts Bar Foundation, the Boston Bar Foundation and the Massachusetts Legal Assistance Corporation.

the *amici*, are forced to fund litigation against themselves.

ARGUMENT

I. The Conflicting decisions among the Circuits should be resolved.

As the plaintiffs in a challenge to the Massachusetts IOLTA program, the *amici* are confronted with conflicting decisions by the Fifth and Ninth Circuits. The *amici* argue that the logic of the Fifth Circuit should be adopted, while the defendants seek the adoption of the Ninth Circuits' reasoning.

With IOLTA programs in all fifty states taking an estimated $150,000,000.00 per year in clients' interest income, there is little doubt that other courts beyond the Fifth, Ninth, and now First Circuits, will have to address these identical issues.

A. First Conflict: What analysis should courts apply?

One of the first questions that will need to be addressed in the resolution of *amici*'s challenge to the Massachusetts IOLTA program is which form of takings analysis should be applied. The Ninth Circuit chose to apply the *ad hoc* regulatory takings analysis. The Fifth Circuit analyzed the Texas IOLTA program under the *per se* takings analysis. *See Washington Legal Foundation v. Texas Equal Access to Justice Foundation* ["*TEAJF*"], 270 F.3d 180, 186 (5th Cir. 2001), *citing*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See also*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (holding that the *ad hoc* analysis is appropriate when determining if a

regulation of the use of private property goes too far and amounts to a taking, while the *per se* analysis is to be applied to regulations that "compel the property owner to suffer a physical 'invasion' of his property" or "where regulation denies all economically beneficial or productive use of land").

The First Circuit has recently stated its understanding of,

> "the two prongs of takings jurisprudence: *per se* (or categorical) takings and regulatory takings. Government action categorically violates the Takings Clause if it results in the permanent physical occupation of property or if it denies the owner all economically beneficial use of his property. In these instances, known as *per se* takings, just compensation is required, no matter how minor the invasion or how great the public purpose served by the regulation. In contrast, in noncategorical regulatory takings cases, courts must engage in an ad hoc, factual inquiry to determine whether the government regulation goes too far."

Philip Morris, Inc. v. Reilly, 267 F.3d 45, *21-22 (1st Cir. 2001) (internal citations omitted), *reh'g en banc granted*, No. 00-2425 (November 16, 2001), *argued*, January 7, 2002.

In its pre-*Phillips* decision on IOLTA, the First Circuit applied the *per se* analysis to a review of whether the use of client funds held in IOLTA as a mechanism for generating interest income for the state constituted a temporary taking of the principal. *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 975 (1st Cir. 1993). In that case, the First Circuit held that the taking of interest income was not at issue, based on the now indefensible argument that the clients "do not have a

property right to the interest earned on their funds held in IOLTA accounts." *Id.* at 975-76. Based on that erroneous proposition, the only claim reviewed under the *per se* analysis was whether the clients' property right to exclude others from the use of their funds had been violated. *Id.* at 976. In doing so the First Circuit attempt to distinguish this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

> "In *Webb's*, the Court found that the claimants to the interpleaded fund had a recognized property right to the interest earned while the funds were held by the county registries. In this case, the plaintiffs do not have a property right to the interest earned on their funds held in IOLTA accounts . . . The *Webb's* claimants had property rights to accrued interest which is tangible personal property, while plaintiffs in this case have claimed only intangible property interests" – the right to control and exclude others.

Massachusetts Bar Foundation, 993 F.2d at 975-76.

The First Circuit thus implied that if clients had a property right to the interest income generated by IOLTA, then, under the *per se* analysis applied by this Court in *Webb's*, a taking requiring compensation would have occurred. *See Webb's*, 449 U.S. at 163. This would put the First Circuit in conflict with the decision of the *en banc* panel of the Ninth Circuit.

This Court recently stated that the *per se* and *ad hoc* tests are not interchangeable.

> "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. __, No. 00-1167, 2002 U.S. LEXIS 3028, *34 (April 23, 2002). *Tahoe-Sierra Pres. Council* makes a clear on the inapplicability of the *per se* analysis in cases involving the regulations of the use of property. This Court should use this opportunity to add an equally clear statement that an *ad hoc* analysis is not appropriate where government has actually appropriated personal property.

B. Second Conflict: What relief will be available to the *amici*?

Another question the Court in Massachusetts will need to answer is: What relief will the *amici* be entitled to, given that the Massachusetts IOLTA program, like those in Texas and Washington, does not contain, "'reasonable, certain and adequate provision for obtaining compensation.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974), *quoting, Cherokee Nation v. S. Kansas R. Co.*, 135 U.S. 641, 659 (1890). In their case, the *amici* are asking for an injunction against the enforcement of the Massachusetts IOLTA program, because it does not include a process by which clients may seek compensation for their private property that has been taken.

When confronted with this question, the Fifth Circuit held that where a governmental policy takes property without providing a mechanism for just compensation, injunctive relief is an appropriate remedy. *TEAJF*, 270 F.3d at 194. The Ninth Circuit rejects the use of such a remedy.

II. How IOLTA funds are used in Massachusetts.

IOLTA requirements came into existence beginning in the 1980s as a mechanism to fund legal services groups. The industry of Legal Services groups funded by IOLTA often target the interests of the very people who unwittingly provide their funding.

- In 1990, IOLTA grant recipient, Massachusetts Law Reform Institute (MLRI), filed a brief with the Supreme Judicial Court advocating in favor of a tax increase. In 1992, MLRI advocated against the repeal of Massachusetts' estate tax. MLRI lobbied against a bill that sought to limit the availability AFDC benefits to teenagers with excessive absences from school. After welfare reforms were enacted, MLRI sent a letter to other non-profit organizations urging them not to participate in workfare.
- In 1989, Grant recipient, Greater Boston Legal Services (GBLS), along with MLRI, brought a case seeking to continue government benefits for illegal aliens.
- Grant recipient Western Massachusetts Legal Services brought an action seeking welfare benefits for a man who won $75,000 in the lottery, then lost the money on a drug and gambling binge. Western Massachusetts Legal Services Corporation published a brochure that advises welfare recipients who inherit or win large amounts of money on how to remain on public assistance. The brochure advised:

> "Since in most cases you want to resume your [welfare] eligibility as soon as possible, you will want to spend the money as quickly as possible . . . You can buy a special gift [or] take a vacation."

- Merrimack Valley Legal Services lobbied against a bill that would removed drug addicts and mental patients from housing for the elderly.

III. Summary

IOLTA remains an unresolved question across the country. The conflicting decision by the only two Courts of Appeal to have reviewed IOLTA in light of this Court's *Philips* decision have not added any clarity to the issue. Unless this Court brings clarity to this issue, further conflicting decision from across the nation are inevitable.

The petition not only provides the Court with ability to resolve the question of IOLTA's constitutionality, granting the petition will also provide the Court with the opportunity to end the confusion, which obviously exists between at least the Fifth and Ninth Circuits, as to when the *per se* and *ad hoc* takings analyses are appropriate.

CONCLUSION

The *Amici Curiae* pray that certiorari will issue.

Respectfully submitted,

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